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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOEL RUIZ, On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

GAP, INC. and VANGENT, INC.

Defendants.

Case No. C 07-5739 SC

GAP INC. AND VANGENT, INC.'S JOINT OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Date: March 20, 2009
Time: 10:00 a.m.
Room: Courtroom 1, 17th Floor
Judge: Honorable Samuel Conti

Complaint filed: November 13, 2007

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I. INTRODUCTION

This "Fear of Identity Theft" class action arises from the theft of a laptop computer in September 2007 from defendant Vangent, Inc. ("Vangent"), a third-party vendor of defendant GAP, Inc. ("GAP"). It contained personal information (names, addresses, and social security numbers) of some 750,000 persons who had applied for jobs with GAP. A year and a half later, the parties are unaware of a single instance of identity theft resulting from the stolen laptop incident.

Plaintiff Joel Ruiz ("Ruiz") is someone who *didn't* have his identity stolen. He now asks the Court to certify a class of all persons whose personal information was on the laptop. The Court should deny class certification because Ruiz cannot meet the requirements of Rule 23 of the Federal Rules of Civil Procedure.

First, defendants have filed a motion for summary judgment, which the Court should decide first. A key issue in that motion is whether Ruiz even has Article III standing and whether he (and any other uninjured class members) even has a claim. (*See* Docket #100.) That ruling could moot or at least narrow this motion for class certification.[1]

Second, no class can be certified where, as here, 100% of the putative class members suffered no legal, cognizable injury. Here, Ruiz has not presented any evidence that he, or anyone in the putative class, has suffered any legal, cognizable injury.

Third, if the Court were to reach this motion, it should deny class certification because Ruiz cannot satisfy Rule 23(a)'s typicality and adequacy requirements and Rule 23(b)(3)'s "predominance" requirement. Ruiz may represent only those persons who are similarly situated to him—in this case, persons whose claimed injury is fear of *future* harm. He cannot represent a

[1] Defendants have also moved for summary adjudication on each of the three claims for relief. Because the notice to class members must describe the claims, class certification should be deferred at least until the parties know which claims survive.

subclass of hypothetical persons who have suffered an actual identity theft.[2] Yet, his class definition encompasses both.

Even within the group of "latent injury" claimants, Ruiz is neither typical nor an adequate class representative. Unlike thousands of other putative class members, Ruiz did nothing to protect himself following the incident, including failing to take advantage of GAP's free one-year credit monitoring service and $50,000 in ID theft insurance. As such, he is subject to unique defenses and cannot represent those who accepted GAP's offer.

Finally, whatever the class definition, Ruiz's motion should be denied because issues relating to causation and damages require individualized assessment for each claimant. As a result, the Court should find that Ruiz's proposed class cannot satisfy Rule 23(b)(3).

II. STATEMENT OF FACTS

A. The Laptop Incident and Ruiz's Admitted Lack of "Injury."

GAP's summary judgment motion includes a Statement of Facts section that describes the laptop incident and Ruiz's lack of injury. (*See* Docket #100, 2-4.) For brevity's sake, Defendants point out that Ruiz admits suffering no injury as a result of the laptop incident and likens his chances of ever having an identity theft as about "equal" to his chances "of getting into a car accident coming to or from [his] deposition." (*Id.*, 8:17-19; Ruiz Depo., 118:1-7 [Stern Decl., Ex A].)

B. Despite Extensive Discovery, Ruiz Has Adduced No Instances of Identity Theft As a Result of the Stolen Laptop Incident.

Ruiz has taken extensive discovery. (*See* Docket #100, 4:9-14.) Despite that, he is unable to identify a single putative class member who has suffered identity theft or cognizable monetary loss. That is because it is highly likely that there are none.

It is not GAP's burden to "prove a negative" by demonstrating that no such persons exist. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff bears burden of

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[2] We call this "hypothetical" because this subgroup has a population of zero. (*See* Section II.B., below.)

establishing all elements of standing, including injury-in-fact); *Fields v. Napa Milling Co.*, 164 Cal. App. 2d 442, 447-48 (1958) (noting proof of damages is an "essential part" of the plaintiff's case for negligence). Nevertheless, there are two compelling reasons to believe that no putative class member suffered an identity theft as a result of the stolen laptop incident.

First, all of the evidence (including the surveillance video tapes at the scene) is consistent with a property crime (i.e., theft of laptop) and not a cyber crime (i.e., theft to obtain the personal data on the hard drive). (Deposition of Keith White ("White Depo."), 87:1-89:23 [Stern Decl., Ex. A].) Both the Chicago Police Department and the FBI so concluded. (*Id.*, 10:21-11:8; 125:3-126:5.) Finally, a forensic computer expert hired by GAP, Professor Aviel D. Rubin of Johns Hopkins University, concluded that "based on the circumstances, all indications are that this was an equipment theft and unrelated to [personally identifiable information]." (Report, dated July 8, 2008 at 2, attached to Rosemary Rivas Decl., Ex. G [Docket #94-8].)

Second, it is unlikely there have been any instances of identity theft arising from this incident for the additional reason that, if there had been, GAP would likely have learned of it. Within nine days of the laptop theft, GAP established a response system that encouraged job applicants to report identity theft.[3] This was a "best in class" response in which GAP extended an offer of one-year free credit monitoring as well as $50,000 in fraud insurance. (Deposition of Bill Chandler ("Chandler Depo.), 58:6-20; 60:7-9; 75:25-76:10; 138:1-4 [Stern Decl., Ex. B].) GAP also established an "elaborate" tracking system to "tease out" claims of actual identity theft. (White Depo., 34:23-36:17; 104:15-111:7 [Stern Decl., Ex. A]; Chandler Depo., 24:25-25:10; 86:19-88:18 173:9-174:9 [Stern Decl., Ex. B].) The results are telling.

All 744,000 job applicants on the Vangent database received a notification letter similar to the one Ruiz received. (Chandler Depo., 50:11-17 [Stern Decl., Ex. B].) Thereafter, the call centers received over 44,000 inquiries. (*Id.*, 43:14-15.) Working from a script, specially trained customer service representatives ("CSRs") identified any caller who hinted at ID theft or

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[3] Plaintiff admits that GAP acted "quickly" to respond to the incident. (Plaintiff's MPA iso Motion for Class Certification ["Motion"] 7:7-9.)

mentioned an unauthorized account opening or credit card charge. (*Id*., 87:1-21; 88:15-18; 173:9-174:9.) CSRs were instructed to ask any such callers for written documentation. (*Id*. 175:19-176:16.)[4]

In all, approximately 2,000 callers got "escalated" to specially trained GAP employees for various reasons. (Chandler Depo., 171:12-17 [Stern Decl., Ex. B].)[5] Any callers claiming identity theft had their calls "escalated" to a GAP employee specially trained to provide counseling to ID theft victims. (*Id.*, 87:1-88:14 .) Only 130 of the approximately 2000 "escalated" callers suggested identity theft. (White Depo., 109:19-110:23 [Stern Decl., Ex. A].) GAP urged those callers to enroll in the free program of credit monitoring and fraud protection, to monitor closely their bank statements and credit reports, and to notify their banks. (Chandler Depo., 215:5-21 [Stern Decl., Ex. B].)

GAP also instructed those callers to send any documentation they have that might suggest identity theft. Approximately sixteen such cases required special investigation. (White Depo., 36:8-13 [Stern Decl., Ex. A].) These calls were routed to fraud specialists working under Keith White, a senior GAP official in charge of GAP's worldwide loss prevention. (*Id*., 39:19-41:4; 110:24-111:7.) But these all turned out to be "false positives," e.g., people whose credit cards were used by a relative. (*Id*., 108:2-109:18.)

In August 2008, for example, the mother of a job applicant phoned saying that someone had fraudulently used her son's SSN. The police told her that it may have happened as a result of the GAP laptop incident. The call was "escalated" to a senior manager who discovered that, in fact, her son's SSN had been misused on June 23, 2007—three months *before* the laptop at issue

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[4] Plaintiff's statement that "GAP never sought or collected documentation from . . . Class members regarding their claims of identity theft" is therefore not true. (Motion, 8:4-5). Also incorrect is Plaintiff's claim that GAP "had no clear or written, discernable protocol for conducting its investigation . . . ." (*Id*., 8:6-8.)

[5] Plaintiff incorrectly states that "between 1,200 and 2,000 Class members" claimed identity theft. (Motion, 8:1-2). That is the number of calls that were escalated, not how many people complained of actual identity theft.

in this case was stolen. (Stern Decl., ¶ 4; Ex. C.)[6] This is an example of what Mr. White calls a "false positive."

Ruiz cynically contends that GAP "cleared itself of culpability for claims of identity theft," and says this does not prove class members are not at risk. (Motion, 8:8-10.) That misses the point. GAP did not create this escalation process to "clear itself of culpability." In fact, GAP did all this months *before* Ruiz even filed his lawsuit. GAP established this escalation procedure to assist applicants who might have been victimized by identity theft arising from the laptop incident. Contrary to Ruiz's contention, GAP has consistently *encouraged* the reporting of identity theft so that cases could be investigated and victims of identity theft, if any, could be made whole. (White Depo., 104:15-105:24 [Stern Decl., Ex. A].)

Despite this process, designed to "tease out" and respond to instances of actual identity theft, no such instances surfaced among the 750,000 letter recipients. (*Id.*, 36:13-16; Chandler Depo., 198:12-15 [Stern Decl., Ex. B].) No incidents of suspicious credit report activity or unauthorized account openings occurred among this group either. (Chandler Depo., 222:17-21; 225:2-6 [Stern Decl., Ex. B].) Nor has GAP been told by Experian—the company that offered ID theft insurance—that any job applicants have filed a claim for fraud insurance. (*Id*., 121:14-17.)

Ruiz bears the burden of proving legal injury. *See, e.g.*, *Lujan*, 504 U.S. at 561; *Fields*, 164 Cal. App. 2d at 447-48. He has not met his burden.

III. THE LEGAL STANDARD

The burden is on Ruiz to prove the elements of Federal Rule of Civil Procedure 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. He also bears the burden of proving at least one of the requirements of Rule 23(b). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Failure to prove any one of these elements precludes class certification. *Id*.; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th Cir. 1976).

[6] GAP has produced to Ruiz all of the "escalation" records. (Stern Decl., ¶ 4.)

IV. ARGUMENT

A. The Court Should First Decide Defendants' Motions for Summary Judgment.

The Court should decide Defendants' motions for summary judgment before class certification. First, a key issue on summary judgment is whether Ruiz has Article III standing. (Docket #100.) Jurisdiction always presents a threshold issue and should be decided first. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998); *Potter v. Hughes*, 546 F.3d 1051, 1055 (9th Cir. 2008).

Second, a "district court has discretion to rule on a motion for summary judgment before it decides the [class] certification issue" where "it is more practicable to do so and where the parties will not suffer significant prejudice." *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984); *see also Hipolito v. Alliance Receivables Mgmt., Inc.*, No. C-05-0842 JCS, 2005 WL 1662137, at *2-3 (N.D. Cal. July 15, 2005). In *Wright*, the court held that it is "reasonable to consider a Rule 56 motion first when early resolution of a motion for summary judgment seems likely to protect both the parties and the court from needless and costly further litigation." *Id.* at 544. That same rationale applies here.

This is what the Seventh Circuit did in *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 632 (7th Cir. 2007), another Fear-of-Identity-Theft case discussed in GAP's motion for summary judgment. (Docket #100, 5.) There, the court granted judgment on the pleadings and dismissed the motion for class certification as moot due to plaintiff's failure to show a legally cognizable injury. The same is true here.

Ruiz cannot show prejudice. Since April 25, 2008, the Court's case management order has contemplated that these motions would be heard together. (Docket #52.) Moreover, if the Court were to grant Defendants' motions for summary judgment or summary adjudication, class certification would become moot or at least narrowed. *See id.*; *see also Carvalho v. Equifax Info. Servs., Inc.*, 588 F. Supp. 2d 1089, 1091 (N.D. Cal. 2008); *Dacanay v. Gov't of Guam*, No. 05-00017, 2006 WL 2244579, at *1 (D. Guam Aug. 4, 2006) (Ware, J.). Addressing summary judgment at the outset also enables the parties to potentially avoid the substantial costs of class

notification and the hiring of a class action administrator, as well as the months' long delay of awaiting expiration of the opt-out period once class notices have been distributed.

The Court should decide summary judgment first, then class certification.

B. No Class Can Be Certified Because No One Has Suffered Legal Harm.

If, after ruling on summary judgment, the Court were still inclined to hear this motion, it should deny it. Ruiz has not adduced any evidence that even a single putative class member—let alone Ruiz himself—has suffered a legally cognizable harm. This is fatal. A class may not be certified if, as here, the class includes persons who have not suffered legally cognizable harm.

In *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) the Ninth Circuit reversed class certification where only a *small* percentage of the class suffered actual injury from a drug. Here, Ruiz has not presented genuine, material evidence that *any* potential class member has had his or her identity stolen. As this Court noted at the outset: "[t]he only harm Ruiz alleges is that, as a result of the laptop thefts, he is now at 'an increased risk of identity theft.'" (Order, Docket #46, 4:27-5:2).

Nothing has changed since then. Indeed, in the just-filed First Amended Complaint ("FAC"), prepared with the benefit of extensive document and deposition discovery, the only injury Ruiz continues to alleges on behalf of himself and potential class members is that GAP's "compromising of their [personal identifying information] has placed them *at an increased risk* of identity theft." (FAC, ¶¶ 80, 83 [italics added].)

Cases from other circuits are consistent with *Valentino*. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (affirming denial of certification where proposed class was not sufficiently definite because "[it] could include millions who were not deceived and thus have no grievance"); *see also In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, Nos. 05 C 4742, 05 C 2623, 2007 WL 4287511, at *5 (N.D. Ill. Dec. 4, 2007) (denying certification; "the proposed class definition would include many class members who were not deceived and suffered no damage . . . . This deficiency dooms class certification.")

Despite months of discovery, Ruiz fails to provide genuine and material evidence that anyone—let alone everyone—in the putative class has suffered an actual injury. This precludes

class certification. *See Amchem Prods., Inc.*, 521 U.S. at 628-29 (affirming denial of class certification where some members of the class had developed asbestos-related injuries while others were only at risk of developing such injuries); *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 645 (N.D. Cal. 1987) (ruling plaintiffs who did not suffer injury must be severed from the class).

Ruiz disagrees and contends that his *fear* of identity theft and his expenditure of time and/or money to protect himself constitutes legal injury. (Motion, 8:11-9:18.) For example, Ruiz contends that his personal decision to sign up for a commercial credit monitoring product on February 6, 2009—a week before filing his motion and more than sixteen months after the laptop incident—constitutes injury. (*Id.*, 8:15-18; *see also* Decl. of Joel Ruiz iso Mot. for Class Cert. ("Ruiz Decl."), ¶¶ 4-5.) But, as discussed in GAP's motion for summary judgment, time and money spent on protecting one's self against uncertain future identity theft is not legal injury. *See, e.g.*, *Pisciotta*, 499 F.3d at 639; *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006); *see also* additional cases cited in Docket #100, 7.

Moreover, such credit monitoring is precisely what GAP offered *for free* (Ruiz Decl., ¶ 3, Ex. A), and Ruiz declined. This voluntary expenditure also is not an "injury," since federal law already gives every consumer the right to a *free* annual credit report from each of the three credit monitoring bureaus. (15 U.S.C. § 1681g; 16 C.F.R. § 610 *et seq.*) That Ruiz chose to buy something he could get for free is not "injury." Finally, this purchase was a decision made by Ruiz individually. He has not shown that this cost was incurred by every class member.

Ruiz further speculates that the laptop theft might have been a cyber crime. (*Cf.*, Motion, 7:7-9.) But he offers no evidence to support his conjecture. Ruiz posits, first, that the thief might have been after the data because he bypassed other equipment. (Motion, 7:17-20.) But law enforcement officials and Professor Rubin both considered this scenario and nevertheless concluded that it was a property crime, in part because these laptops were newer models. Second, Ruiz speculates that it might have been a cyber crime because GAP offered a reward and the laptop was never returned. (Motion, 7:20-22.) This makes no sense. A cyber thief would be just as likely as a property thief to ignore a reward. Third, Ruiz says that GAP itself was concerned that revealing Vangent's identity somehow shows it was a cyber crime. (Motion, 7:22-23.) Just

the opposite. GAP was concerned that revealing Vangent's identity might run the risk of alerting the thief and thereby converting a property crime into a cyber crime. (Chandler Depo., 63:16-64:24 [Stern Decl., Ex. B].)

As discussed, it is Ruiz's burden to prove injury. He has not met that burden. Abject speculation is not evidence and should be rejected. *See Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530-31 (5th Cir. 1987) (upholding district court's denial of class certification where plaintiff "relied only on rank speculation and conclusory assertions to support his claim to class relief.")

It is Ruiz's burden to prove he and every other putative class member has been injured. He has not met that burden. No class can be certified under such circumstances.

C. The Class As Defined Does Not Satisfy the Elements of Rule 23(a) or 23(b).

Even if the Court were to get past the absence of legal injury, Ruiz's motion should be denied under Rule 23. Here, the FAC defines the proposed class as follows:

> All persons that applied for an in-store position with a Gap brand store, through Gap and Vangent, Inc.'s ("Vangent") application process from July 1, 2006 to July 31, 2007, and whose personal information was stored in the laptop stolen on September 17, 2007 from Vangent's Chicago, Illinois facility.

(FAC, ¶ 68).[7] This definition encompasses both those whose injury has already become manifest and those who, like Ruiz, have only a latent injury. Because Ruiz's only injury is a latent one, he cannot represent both types of claimants—the class he has identified.

1. If There Are Actual ID Theft Victims, Ruiz Cannot Represent Them.

Rule 23(a) requires that a named plaintiff be able to "fairly and adequately protect the interests of the class," and assert claims or defenses that "are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3), (4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc.*, 521 U.S. at 625. Likewise, the "typicality" requirement tests "whether

[7] The FAC asserts the wrong dates. The affected job applicants applied between July 2006 and June 2007—not *July* 2007. (FAC, ¶ 39).

other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

The same defect hobbles Ruiz's showing under Rule 23(b)(3). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982). This is a corollary to the rule that common questions of law or fact must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *Amchem Prods., Inc.*, 521 U.S. at 615. If "material variations exist as to the law or facts involved with individual class member injuries, then the commonality requirement [is] not . . . met." *La Duke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985); *Hum v. Dericks*, 162 F.R.D. 628 (D. Haw. 1995) (denying certification where the fact of injury is an element of the claim and is not common); *Robertson v. N. Am. Van Lines, Inc.*, No. C-03-2397 SC, 2004 WL 5026265, at *5 (N.D. Cal. April 13, 2004) (Conti, S.) (common issues do not predominate in claims against interstate carrier for violations of federal regulations: "each member of the class will have to show, inter alia, that they requested to pay 110 percent of their estimate in a form acceptable to the carrier and were denied possession of their goods.")

Ruiz's class definition is broad enough to encompass persons, if any, who suffer actual ID theft from the laptop theft. Plaintiff has stated that he fully intends to represent any such claimants. (*See* Pls.' Mem. of Points & Authorities in Opp'n to Gap Inc.'s Mot. to Strike Class Definition [Docket #59, 9].) He cannot. Ruiz, who has suffered no actual injury himself, can no more represent these individuals than an "exposure-only" asbestos victim could represent a class that includes persons with asbestosis symptoms that have already become manifest. In *Amchem*, the Supreme Court held that no such class could be certified. *Amchem Prods., Inc.*, 521 U.S. at 626 (interests of class members who have been diagnosed with asbestosis are not aligned with those who merely faced heightened risk of contracting the disease). *Amchem* is controlling.[8]

[8] Following *Amchem*, the Second Circuit has held that a class action settlement that had been approved twelve years earlier was invalid where it purported to settle the claims of Vietnam veterans exposed to Agent Orange but who had experienced no symptoms.

(Footnote continues on next page.)

Ruiz could never adequately represent the hypothetical "manifest" group. Indeed, "it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury…) *requires division into homogeneous subclasses* under Rule 23(c)(4)(B), *with separate representation* to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) [italics added].

Because Ruiz himself is uninjured, he could not bind any hypothetical class members who are injured. *See Richards v. Jefferson County*, 517 U.S. 793, 805 (1996). Such a result would violate due process: A "holder of . . . property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961).

Ruiz cites *Amchem* but makes no mention that it dooms his class certification motion. (*See* Motion, 13). His other cited cases also undermine his argument. In *Wehner*, 117 F.R.D. at 645, for instance, Judge Williams held that claimants who had not suffered actual injury from dioxin contamination must be severed from the class of those who had. Similarly, in *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 287 (S.D. Ohio 1997), a medical monitoring case, the court divided the class into subclasses depending on whether the claimant had suffered a present physical injury. And, unlike this case, *In re Tri-State Crematory Litig.* and *Sterling v. Velsicol Chem. Corp.* were mass tort cases that did not involve the conflict between present and future claimants. *See In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 696 (N.D. Ga. 2003) (involving class comprised of those whose relatives' bodies had been mishandled by a crematorium); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) (case where proposed class consisted of persons who suffered injury as a result of ingesting contaminated water).

(Footnote continued from previous page.)

Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001). There, plaintiffs who had only latent injuries at the time of the earlier settlement but developed cancer later were inadequately represented in the prior litigation and, therefore, were not be bound by the court-approved settlement. *Id.* at 261.

2. Even as to "Latent" Injury Plaintiffs, Ruiz is Subject to Unique Defenses and Cannot Represent Any Person Who Signed Up for Credit Monitoring.

"[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508. Here, even as to the "latent injury" group, Ruiz is neither an adequate representative nor is he typical within the meaning or Rule 23(a).

As discussed in GAP's summary judgment motion, Ruiz received GAP's notification letter in early October 2007, but never signed up for GAP's free offer of credit monitoring and ID theft insurance. He tried to phone GAP once, but hung up when he was put on hold. GAP's notification letter also advised Ruiz he could enroll on-line, but he never did that either. Ruiz's indifference went beyond just failing to take advantage of GAP's free offer. GAP also advised job applicants to notify their banks and sign up for a free credit report from one of the three major credit reporting agencies. Ruiz ignored that advice, too. (*See* Docket #100, 3:3-20.)

Ruiz's failure to take advantage of GAP's free credit monitoring services subjects him to unique defenses. He is not typical of the thousands of putative class members who took advantage of GAP's offer and signed up for the free protective measures made available to them. Furthermore, if Ruiz were to have a future identity theft, his failure to accept the free $50,000 in fraud insurance makes him differently situated from class members who accepted that benefit.

It is not enough that Ruiz and the other class members applied for a job with GAP, had their personally identifiable information exposed, and purportedly have to "spend time/and or money in the future to protect themselves from identity theft." (*Cf.*, Motion, 12:5-11, 19-22). Here, Ruiz insists that GAP's one-year credit monitoring and ID theft insurance was inadequate, yet he turned down that remedy even after retaining counsel. He cannot represent those who accepted this offer.

3. Plaintiff Cannot Satisfy Rule 23(b)(3) Because Individual Issues of Causation and Damage Predominate.

Even if the Court were to depart from the eighteen other decisions that have rejected Fear-of-Identity-Theft cases on either standing or lack-of-injury grounds (see Docket #100, 5-10), still

no class could be certified. Ruiz would still have failed to show that common issues of law and fact "predominate" across the claims of the putative class members he seeks to represent. *See, e.g., Rogers v. NationsCredit Fin. Servs. Corp.*, Case. No. C-98-2680 SC, 2000 WL 1499354, at *5 (N.D. Cal. Aug. 7, 2000) (*denying* certification; "individual issues that are central to liability predominate over any common issue of fact or law").

a. Ruiz Fails To Meet His Burden To Show Each Element of Rule 23(b)(3).

As the party seeking to certify a Rule 23(b)(3) class action, Ruiz bears the burden to "demonstrate that common questions predominate over any questions affecting only individual members and that class resolution is superior to other available methods for adjudication of the controversy." *Id.* "That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc.*, 521 U.S. at 623 . In determining whether predominance has been shown, the Court may look beyond the pleadings to determine whether plaintiff has met his burden. *Hanon*, 976 F.2d at 509; *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007) (holding district court may consider future individual questions in its class certification analysis). Evidence proving the predominance of common questions and showing how those predominant questions will be tried should be considered in resolving this motion. *See Hanon*, 976 F.2d at 509.[9] Here, Ruiz does not offer that evidence or that explanation.

[9] Ruiz contends that the Rule 23 elements are "permissive" and easily satisfied, citing *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007). (Motion, 10:26-11:1; 11:24-12:1). But that opinion was withdrawn when the Ninth Circuit ordered rehearing *en banc*. *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720, 2009 WL 365818 (9th Cir. Feb. 13, 2009). Longstanding Supreme Court authority confirms that a class action can be certified only after "rigorous analysis" of the requirements of Rule 23. *Falcon*, 457 U.S. at 161. "[A]ctual, not presumed, conformance with Rule 23[] remains . . . indispensable." *Id.* at 160.

Circuit courts around the country have elaborated that "the requirements set out in Rule 23 are not mere pleading rules." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008); *see also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) ("Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements."). Any "doubt" as to any class-certification element should be resolved against class certification. *In re Hydrogen Peroxide*, 552 F.3d at 321-22.

Ruiz's Motion is not grounded in substantial evidence and is not directed at the issues necessary to carry his burden. "'In order to make the findings required to certify a class action under Rule 23(b)(3) . . . one must initially identify the substantive law issues which will control the outcome of the litigation.'" *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (citation omitted). In other words, a plaintiff needs to discuss the elements of his causes of action. Courts have denied certification where a would-be class representative fails to address how the elements of his claims can be shown by common proof. *See, e.g., Adams v. United States*, No. CIVS040979DFLKJMPS, 2006 WL 618293, at *2 (E.D. Cal. Mar. 10, 2006) ("[I]t was incumbent upon [plaintiffs] to explain why the legal elements of [their] claim, in the circumstances here, lend themselves to class action treatment. Plaintiffs did not do this, and without rigorous analysis of the facts and issues relevant to [their] claim, the court is not in a position to certify a class action based on that claim.").

Here, while Ruiz's predominance analysis gives a passing nod to his causes of action, see Motion at 14, he does not directly address all of the elements for his negligence and breach of contract claims. He focuses in on the duty element of negligence and the breach element of a contract claim, but the other elements get no discussion, specifically causation and injury. That silence is telling.

Courts recognize that negligence claims are generally unsuited for class treatment. *See, e.g., Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 439 (C.D. Cal. 2007) ("The Court also finds that Plaintiff's negligence claim requires individualized issues of fact."); *Drimmer v. WD-40 Co.*, No. 06-CV-900 W(AJB), 2007 WL 2456003, at *2 (S.D. Cal. Aug. 24, 2007). Similarly, courts have denied class certification in contract cases where the moving party could not show how the alleged breach commonly caused economic injuries. *Pastor v. State Farm Mut. Auto. Ins. Co.*, No. 05 C 1459, 2005 WL 2453900, at *6 (N.D. Ill. Sept. 5, 2005) (denying certification in "straightforward breach of contract case" where the court would need to perform individualized inquiries to determine whether a class member is entitled to a payment under breached contract).

Indeed, Ruiz's three causes of action share elements that consistently present individual, not common, questions: causation, the existence of damage, and the determination of damages. Defendants take each in turn.

b. The Need To Demonstrate Causation Defeats a Showing of Predominance.

Courts agree that cases in which proximate cause must be shown make poor candidates for class treatment. In *In re Paxil Litig.*, 212 F.R.D. 539, 541-42 (C.D. Cal. 2003), for example, plaintiffs sought to certify a class of past or current users of the drug Paxil based on its alleged ability to cause severe withdrawal symptoms. The Court denied certification, holding that "individual questions of fact regarding causation [ ] subvert any benefits to be gained through a class action proceeding. Whether, and to what extent, Paxil causes discontinuation symptoms varies from patient to patient." *Id.* at 551; *see also Gartin*, 245 F.R.D. at 439 ("Because the proximate causation analysis involves individualized factual issues, courts generally consider negligence claims ill-suited for class action litigation.").[10] In this case, Ruiz does not demonstrate how the issue of proximate cause can be dealt with on a class-wide basis.

"If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). That is exactly the situation in this case. Here, the evidence each individual would have to marshal to prove causation will vary from class member to class member: Did a person's loss stem from the stolen

[10] *See also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 227 (2d Cir. 2008) (". . . because factors other than defendants' misrepresentation may have intervened and affected the demand and price of Lights . . . plaintiffs cannot establish loss-causation on a class-wide basis"); *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 73 (E.D.N.C. 2008) ("In this case, resolution of the common questions would be the beginning of the beginning. Certification would be an exercise of futility, as the Court would need to address the numerous individual causation questions one by one even if the named plaintiffs are able to prove that silage bags are defective."); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 449 (E.D. Pa. 2000) ("[T]he need to establish injury and causation with respect to each class member will necessarily require a detailed factual inquiry including physical examination of each vehicle, an [sic] mind-boggling concept that is preclusively costly in both time and money. We will not certify a class that will result in an administrative process lasting untold years, where individual threshold questions will overshadow common issues regarding the Defendant's alleged conduct.").

laptop as opposed to, say, a lost wallet, a misplaced credit card, a dishonest friend or family member, or some other completely unrelated incident of identity theft? Each claimant's personal identifying information could have been exposed at different times, in different ways, and for different durations. All of these avenues will have to be explored, and the exploration will have to be done on an individual basis.

c. Because the Existence of Injury Cannot Be Commonly Shown, Plaintiff Has Failed To Show that Common Questions Predominate.

As with causation, the fact that Ruiz cannot show the existence of injury with common evidence precludes a showing that common questions predominate. Defendants have already pointed to case law from around the country that precludes class treatment where no one in the class has suffered legal harm, *see* IV.B *supra*. This "no-injury" effect applies equally under the predominance prong. A recent California Court of Appeal decision affirming the denial of class certification provides a salient example. In resolving a certification question in a case claiming insurer bad faith in denying earthquake coverage claims, the Court of Appeal concluded that no class could be certified because each potential policyholder would need to prove individually that the claim he or she asserted was covered. *Basurco v. 21st Century Ins. Co.*, 108 Cal. App. 4th 110, 119 (2003). As the Court stated: "[T]he existence of damage, the cause of damage, and the extent of damage would have to be determined on a case-by-case basis." *Id.*[11]

The same is true here. In the FAC, Ruiz seeks "compensatory damages." Yet, his Motion offers no evidence that every, let alone any, class member has suffered a compensable injury. With no proof of common compensable injury, commonality cannot be shown. *See, e.g., Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 664 (1993) ("There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.").

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[11] A follow-on decision by the same court reached the same conclusion. *See Newell v. State Farm Gen. Ins. Co.*, 118 Cal. App. 4th 1094, 1103 (2004).

d. The Difficulty In Proving the Extent of Damages Also Precludes a Showing that Common Issues Predominate.

Similarly, even assuming there were individuals who suffered injury (an assumption *In re Hydrogen Peroxide* teaches should not be made), individual fact issues would predominate over common ones as to the extent of each class members' damages. Just as the possible injuries vary in substantial ways, variations in the amount of damages putative class members might have suffered varies as well, defeating Ruiz's predominance showing. *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306-07 (5th Cir. 2003) (finding predominance defeated where the calculation of damages would require separate mini-trials).

Under Ruiz's damages theory – setting aside whether there is any support for it in the law – expenditure of time and money in protecting identity is supposedly "damage."[12] But that theory adds, rather than diminishes, the individualized nature of the issues this case presents. For example, Ruiz describes a number of steps he took to protect his identity. (*See* Motion, 8). To begin, he turned down GAP's free credit monitoring and instead chose to pay for a different commercial product. (*Id.*). He also "reviewed his credit reports." (*Id.*). By his own admission, his experience differs from other putative class members who allegedly experienced long hold times when they contacted GAP's call centers and "needed to call [GAP] multiple times and/or were transferred to speak with multiple persons." (*Id.*, 8-9). Ruiz did not experience that; he hung up. (*See* Docket #100, 3:8-9). He phoned just once, not multiple times. (*Id.*) While he might have incurred cellular telephone charges, others would have used GAP's toll free number or paid nothing beyond their monthly phone bill. Also, unlike Ruiz, many class members accepted GAP's free one-year credit monitoring and thus did not suffer any out-of-pocket expenses. Finally, the vast majority of class members may have done nothing after getting GAP's

[12] The speculative nature of Plaintiff's legal theory is itself grounds to defeat class certification. *See Castano*, 84 F.3d at 747 ("A mass tort cannot be properly certified without a prior record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by Rule 23. This is because certification of an immature tort results in a higher than normal risk that class action may not be superior to individual action."); *see also Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 389 (E.D. Tenn. 2002) (same).

notification letter other than throw it away. Even by Ruiz's definition, they suffered no damage, not even worry.

The individualized inquiry that would be necessary to measure Ruiz's claim for damages (and Defendants do not, of course, concede that Ruiz suffered any) only amplifies that individual questions would predominate over common questions of law or fact.

e. Conclusion: Plaintiff Has Not Shown that Common Issues Predominate.

In short, the extent and measure of any "injury" suffered by absent class members is anything but common, precluding class certification under Rule 23(b)(3). *See Midpeninsula Citizens for Fair Hous. v. ACCO Mgmt. Co.*, 168 F.R.D. 647, 648 (N.D. Ca1. 1996) (denying class certification, citing "highly individualized" damage issues); *see also Siegel v. Shell Oil Co.*, No. 06 C 0035, 2009 WL 449073, at *5 (N.D. Ill. Feb. 23, 2009) ("[I]f the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior to adjudicate the claims"); *In re Methionine Antitrust Litig*., 204 F.R.D. 161, 165 (N.D. Ca1. 2001) (holding "the question of injury in fact is an individual question that would have to be resolved by mini-trials examining the particular circumstances of each class member").[13]

Here, major variations in potential causation, the existence of injury, and the measure of damages exist across the putative class. It is the cumulative impact of these individualized inquiries – causation, the existence of harm, and the determination of damages – which defeats class certification under Rule 23(b)(3).

[13] Defendants are, of course, aware that in run-of-the-mill cases the question of the extent of individual damages in and of itself will not defeat certification. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). Here, however, Ruiz has presented no creditable evidence of cognizable injury or damages, and his allegations as to these issues point to the numerous damage issues the Court would have to confront.

V. CONCLUSION

Almost a year and a half after the laptop theft, Ruiz cannot point to a single incident of identify theft arising from it. There can be no latent injury class because no putative class members have suffered a legally cognizable injury. Yet even if someone *had* experienced identity theft, Ruiz, who has not, could not adequately represent that person's interest. Moreover, that person's claim would entirely depend on the individualized circumstances of his or her identity theft.

For the foregoing reasons, GAP and Vangent respectfully request that the Court deny Plaintiff's motion for class certification.

Dated: February 27, 2009

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I, William L. Stern, am the ECF User whose ID and password are being used to file this **GAP INC. AND VANGENT, INC.'S JOINT OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**. In compliance with General Order 45, X.B., I hereby attest that Andrew N. Goldfarb has concurred in this filing.

Dated: February 27, 2009

/s/ William L. Stern
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